

**FILED**

**SEP 08 2005**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**ROBERT THOMAS CLAWSON,**

**Petitioner - Appellant,**

**v.**

**SECURITIES AND EXCHANGE  
COMMISSION,**

**Respondent - Appellee.**

**No. 03-73199**

**SEC No. 3-9208**

**MEMORANDUM\***

**On Petition for Review of an Order of the  
Securities and Exchange Commission**

**Argued and Submitted May 3, 2005  
Pasadena, California**

**Before: O'SCANNLAIN and RAWLINSON, Circuit Judges, and WHALEY,\*\*  
District Judge.**

**1. Petitioner's contention that the Securities and Exchange Commission**

---

\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

(Commission) found him liable on a theory not alleged in the Order Instituting Proceedings (OIP), thereby violating his due process right to fair notice of the charges against him, is without merit. Due process was satisfied, as Petitioner “understood the issue and was afforded full opportunity to justify his conduct.” *Dep’t of Educ. of the State of Cal. v. Bennett*, 864 F.2d 655, 659 (9th Cir. 1988) (citations and internal quotation marks omitted).

The crux of Petitioner’s argument is that he was charged only with receiving a bribe, something the ALJ found did not occur. However, the OIP did not charge Petitioner with receiving a bribe. The pertinent securities law violation is the selling of stock while omitting to state a material fact, 17 C.F.R. 240.10b-5, and that is exactly what the OIP alleged. The OIP charged Clawson with selling Enrotek stock in return for undisclosed payments of money made or arranged, without informing his customers of his expected or anticipated receipt of additional compensation. In this instance, “in return for” is interchangeable with “in anticipation of.” The eventual receipt of money is irrelevant, because the violation occurred at the time of the sale. Therefore, the Commission’s finding that Petitioner violated the securities laws by selling Enrotek stock while failing to disclose his anticipated receipt of additional compensation is entirely consistent

with, or at least “completely subsumed in,” the theory alleged in the OIP.

*Southwest Sunsites, Inc., v. FTC*, 785 F.2d 1431, 1436 (9th Cir. 1986).

If there was any confusion prior to the hearing, the administrative hearing itself clarified that it was Petitioner’s conduct of, and motivation for, selling Enrotek stock that was at issue. *See, e.g., Bennett*, 864 F.2d at 659 (stating that the “actual conduct of the administrative proceedings” could provide adequate notice of the conduct at issue).

Finally, Petitioner suffered no prejudice, as he has failed to identify any additional evidence or defenses he would have proffered had he been given specific notice that the charge included anticipated receipt of compensation. *See, e.g., Southwest Sunsites, Inc.*, 785 F.2d at 1436 (finding no due process violation where “it was [not] readily apparent that different defenses and proofs would be used in defending against two theories of liability.”) (citation, alteration, and internal quotation marks omitted).

2. The delay in bringing the Commission’s charges to a hearing did not violate Petitioner’s due process rights. Assuming, without deciding, that 28 U.S.C. § 2462 applies, the OIP was issued within the five-year statute of limitations. The subsequent stays pending the resolution of the criminal proceedings were

consistent with SEC rules favoring such stays. *See* 17 C.F.R. 201.210(c)(3). It was also entirely proper for the SEC to seek stays while pursuing settlements. *See, e.g., SEC v. Rind*, 991 F.2d 1486, 1492 (9th Cir. 1993) (recognizing the Commission’s practice of seeking “settlement in order to avoid costly and time-consuming litigation.”). Finally, Petitioner acquiesced to the stays, never objecting until a month before the hearing, when he filed his motion to dismiss.

**3.** The Commission’s finding that Petitioner sold Enrotek stock in anticipation of receiving undisclosed payments of money is supported by substantial evidence. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Ponce v. SEC*, 345 F.3d 722, 728 (9th Cir. 2003) (citations omitted). In addition, we must “examine the evidence with a deferential eye” and uphold the findings of the Commission even if “we determine that the evidence is open to more than one interpretation.” *Id.* (citations and internal quotation marks omitted).

There was substantial evidence before the Commission to support its findings. Although he had never sold a penny stock previously, Petitioner touted and sold Enrotek, which happened to be the same stock brokers were being paid to sell. Petitioner admitted knowing of Woodbridge’s efforts to boost the price of

Enrotek stock. Petitioner also sent a letter to Enrotek's CEO asking for payment in return for sales of Enrotek stock to Petitioner's customers. Despite the fact that his firm prohibited the selling of Enrotek, Petitioner traveled all the way to Canada to "research" the company. He also continued to persuade his customers to purchase Enrotek, albeit through an account at FABS, where he would earn no commissions. The broker on the FABS account was none other than Mikulka – Woodbridge's friend and partner.

That this evidence is circumstantial is of no consequence. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.") (citation omitted); *United States v. Ciccone*, 219 F.3d 1078, 1084 (9th Cir. 2000) ("The government can establish knowledge of a fraudulent purpose by circumstantial evidence.") (citation omitted). Moreover, the fact that there may be alternative explanations for Petitioner's conduct is not enough for us to disturb the Commission's findings. *See Ponce*, 345 F.3d at 728 ("If . . . the evidence is open to more than one interpretation, we are required to uphold the SEC's finding.") (citation omitted).

4. The Commission has the authority to bar a person from being associated

with a broker or dealer, or from participating in the offering of a penny stock, if it finds that such bar is in the public interest. 15 U.S.C. § 78o(b)(6)(A). After considering the factors enumerated in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), the Commission found that such a bar against Petitioner was in the public interest. As this sanction was not “unreasonable or . . . unwarranted in law or without justification in fact,” it was not an abuse of discretion. *Vernazza v. SEC*, 327 F.3d 851, 862 (9th Cir. 2003) (citation and internal quotation marks omitted).

The penalty of \$50,000 for each act of fraud or deceit – a total of \$100,000 – was well within the Commission’s discretion. *See* 15 U.S.C. § 78u-2(b)(2). The fact that Petitioner himself did not financially benefit is merely one factor that *may* be considered when determining whether such a penalty is in the public interest. 15 U.S.C. § 78u-2(c).

**PETITION DENIED.**